

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF &
APPENDIX**

76-1568

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :

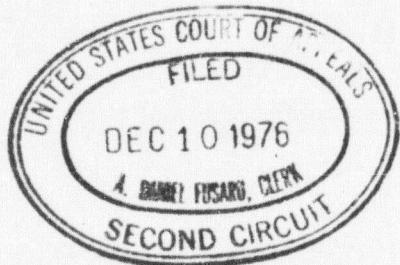
Appellee, :

-against- : Docket No. 1568

JOHN ERROL ASHER, :
Defendant-Appellant. :

-----X
ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT



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TABLE OF CONTENTS

	Page
Table of Authorities.	ii
Cases.	ii
Statutes	iii
Questions Presented	1
Statement Pursuant to Rule 28(3), Federal Rules of Appellate Procedure	2
Statement	3
Argument:	
Point I:	
THE SENTENCE IMPOSED ON COUNT 2 IS ILLEGAL BECAUSE THE CRIME OF CAUSING THE SUBMISSION OF FALSE STATEMENTS TO H.E.W. IS, IN THIS CASE, A LESSER INCLUDED OFFENSE OF THE CRIME OF CAUSING THE SUBMISSION OF FALSE MEDICAID CLAIMS TO H.E.W. AND THUS THE CONVICTION ON COUNT 2 IS MERGED INTO THAT ON COUNT 1 AND SEPARATE SENTENCES ARE PROHIBITED	5
Conclusion.	12

TABLE OF AUTHORITIES

Cases:	Page
<u>Bell v. United States</u> , 349 U.S. 81, 75 S. Ct. 620 (1955)	6
<u>Chandler v. United States</u> , 468 F. 2d 834 (5th Cir. 1972)	11
<u>Gore v. United States</u> , 357 U.S. 386, 78 S. Ct. 1280, 1 L. Ed. 2d 1405 (1958)	10
<u>Gorman v. United States</u> , 456 F. 2d 1258 (2d Cir. 1972)	6
<u>Harris v. United States</u> , 359 U.S. 19, 79 S. Ct. 560, 3 L. Ed. 2d 597 (1959)	10, 11
<u>Prince v. United States</u> , 352 U.S. 322, 77 S. Ct. 403 1 L. Ed 2d 370 (1957)	6
<u>Sansone v. United States</u> , 380 U.S. 343, 85 S. Ct. 1004, 13 L. Ed. 2d 882 (1965)	11
<u>Sweoston v. United States</u> , 289 F. 2d 166 (8th Cir. 1961)	10
<u>United States v. Beasley</u> , 519 F. 2d 233 (5th Cir. 1975)	7
<u>United States v. Candella</u> , 487 F. 2d 1223 (2d Cir. 1973), <u>cert. denied</u> , 417 U.S. 977 (1974)	7
<u>United States v. Johnson</u> , 284 F. Supp. 273, <u>affirmed</u> , 410 F. 2d 38, <u>cert. denied</u> , 396 U.S. 822 (1969)	6
<u>United States v. Lodwick</u> , 410 F. 2d 1202 (8th Cir. 1969)	3
<u>United States v. Sacco</u> , 367 F. 2d 368 (2d Cir. 1966)	11

TABLE OF AUTHORITIES

	Page
Cases:	
<u>United States v. Slutsky</u> , 487 F. 2d 832 (2d Cir. 1973), cert. denied, 416 U.S. 937 (1973)	7, 8, 9, 10, 11
<u>United States v. Terrell</u> , 390 F. Supp. 371 (S.D.N.Y. 1975)	8
<u>United States v. Turner</u> , 518 F. 2d 14 (7th Cir. 1975)	11
<u>United States v. Welty</u> , 426 F.2d 615 (3d Cir. 1970)	12
<u>United States v. Wertheimer</u> , 434 F. 2d 1004 (2d Cir. 1970)	10
<u>United States v. White</u> , 417 F. 2d 89 (2d Cir. 1969)	8, 9, 10, 11
 Statutes:	
18 U.S.C. §287.	1, 2, 3, 6, 9, 10
18 U.S.C. §1001	1, 2, 4, 6, 9
26 U.S.C. §7201	8
26 U.S.C. §7203	8
26 U.S.C. §7206(1).	8

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Appellee, :
-against- : Docket No. 76-1568
JOHN ERROL ASHER, :
Defendant-Appellant. :
-----X

BRIEF FOR DEFENDANT-APPELLANT

QUESTION PRESENTED

Where a defendant causes the submission for payment of fraudulent Medicaid invoices which perjuriously certify the provision of medical services not rendered and on the basis of these invoices he is convicted for both causing the filing of false claims against the United States Department of Health, Education, and Welfare (H.E.W.) in violation of 18 U.S.C. §287 (Count 1) and for causing the submission of false statements to H.E.W. in violation of 18 U.S.C. §1001 (Count 2), may he be consecutively sentenced for the two offenses?

STATEMENT PURSUANT TO RULE 28(3),
FEDERAL RULES OF APPELLATE PROCEDURE

This is an appeal from an order of the United States District Court for the Southern District of New York (Carter, J.) entered on November 18, 1976, denying without opinion appellant John Errol Asher's motion pursuant to Rule 35, Federal Rules of Criminal Procedure, to vacate as illegal, the sentence of six month's imprisonment to be followed by one day's probation imposed on Count 2 of Information S 76 Cr. 518 on July 20, 1976. Count 2 charged a violation of 18 U.S.C. §1001.

The sentence imposed on Count 2 was ordered to be served consecutively to a sentence of six month's imprisonment followed by 18 months probation imposed on Count 1 which charged a violation of 18 U.S.C. §287. The two count Information to which Asher pleaded guilty superseded Indictment S 76 Cr. 242 (A 5 - A 14).*

At the time of his sentence, Dr. Asher was a 34 year old internist of extraordinary ability and dedication. He held the position of Chief of the Infectious Diseases Section at Morrisania Hospital in the Bronx, was also on the staff at Montefiore Hospital and devoted the substantial bulk of his time to providing high quality care to the poor.

*References in parenthesis preceded by "A" are to pages of Asher's Appendix annexed to this brief.

At the time of his sentence he was the nineteenth defendant sentenced in conjunction with a two year Medicaid fraud investigation by the United States Attorney's Office. While his role in the scheme was substantially less than many others, he received a harsher sentence than all but one person who received a 12 month sentence. A motion to reduce sentence on the basis of these and other factors was denied on September 15, 1976 (A 19 - A 23).

The defendant began serving his sentence on August 20, 1976 and is incarcerated at the Federal Correction Facility at Allenwood, Pennsylvania. The mandatory release date with respect to the sentence imposed on Count 1 is January 5, 1977.

STATEMENT

Paragraph 12 of Count 1 of the Information (A 17) charged a violation of 18 U.S.C. §287 committed as follows:

"From on or about November 1, 1970 to on or about December 31, 1973 in the Southern District of New York, and elsewhere, John Errol Asher, the defendant, unlawfully, wilfully and knowingly did make and present, and cause to be made and presented to the United States Department of Health, Education and Welfare, a department and agency of the United States, for payment, certain claims upon and against the United States, to wit, by submitting,

and causing to be submitted, various "Invoices for Doctor's Services" to the New York City Department of Social Services which invoices contained his certification that the services described therein were furnished by him at certain times to certain Medicaid patients, when in truth and in fact, as he then and there well knew, said claims were false, fictitious and fraudulent in that some or all of the said services were not furnished by him."

Count 2 (Paragraph 13 of the Information [A 18]) charged a violation of 18 U.S.C. 51001 based on the same invoices committed as follows:

"From on or about November 1, 1970, to on or about December 31, 1973, in the Southern District of New York, in a matter within the jurisdiction of the department and agency of the United States, to wit, the United States Department of Health, Education and Welfare, John Errol Asher, the defendant, unlawfully, wilfully and knowingly did falsify, conceal and cover up, and cause to be falsified, concealed and covered up, by trick, scheme and device, material facts, and did make and cause to be made false, fictitious and fraudulent statements and representations and did make and cause to be made and did use and cause to be used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries, in that the defendant, John Errol Asher submitted and caused to be submitted to the United States Department of Health, Education and Welfare various false and fraudulent statements which were based upon "Invoices for Doctor's Services" in which it was certified that medical services were furnished

by him to the Medicaid patients listed therein, when, in truth and in fact, as the defendant then and there well knew, said certifications were false in that some or all of the claimed medical services were not rendered."

It is clear from the face of the Information that false claims of Count 1 and the false statements of Count 2 arose out of the same false invoices and it is equally clear that the Information was specifically drafted to include the same false invoices as the foundation of both counts (see affidavit of S. Andrew Schaffer, A 28, A 29).

On September 23, 1976 the defendant filed a motion seeking to vacate the sentence imposed on Count 2 on the ground that such sentence was an illegal multiple punishment for an offense which was, on the facts of the case, a lesser included offense of the crime charged by Count 1 of the Information. The motion was denied on November 18, 1976 and this expedited appeal ensued.

ARGUMENT

POINT I

THE SENTENCE IMPOSED ON COUNT 2 IS ILLEGAL BECAUSE THE CRIME OF CAUSING THE SUBMISSION OF FALSE STATEMENTS TO H.E.W. IS, IN THIS CASE, A LESSER INCLUDED OFFENSE OF THE CRIME OF CAUSING THE SUBMISSION OF FALSE MEDICAID CLAIMS TO H.E.W. AND THUS THE CONVICTION ON COUNT 2 IS MERGED INTO THAT ON COUNT 1 AND SEPARATE SENTENCES ARE PROHIBITED

While it has been held that the use of separate counts

of an indictment to charge violations of both Sections 287 and 1001 for the same false financial claim against the United States does not render the indictment multiplicitous, United States v. Johnson, 284 F. Supp. 273, 278, affirmed 410 F. 2d 38, cert. denied, 396 U.S. 822 (1969), it by no means follows that consecutive or even multiple concurrent penalties are permissible.

Where two separate crimes are based on the same conduct, multiple sentences are impermissible unless there is a clear Congressional intent to allow it. Prince v. United States, 352 U.S. 322 (1957) (consecutive sentences impermissible for violation of separate sections of the federal bank robbery statute); Gorman v. United States, 456 F. 2d 1258, 1259 (2d Cir. 1972) (concurrent sentences also impermissible for violation of separate sections of the federal bank robbery statute). Where Congressional intent is unclear, a rule of leniency prevails against multiple punishment. Bell v. United States, 349 U.S. 81 (1955).

As indicated in United States v. Johnson, supra, Title 18, Sections 287 and 1001 previously were contained in the same statute, former Section 80 of Title 18. The development of what is now Section 1001 shows a clear Congressional intent to create a separate crime to reach behavior falling short of the actual submission of a false financial

claim to a federal agency. Thus, it made punishable other forms of false statements. It also weakened the jurisdictional requirement from an actual presentation of a claim to a federal agency to making a statement or representation on subject matter within the jurisdiction of a federal agency even if the statement or representation never reached the federal agency. See e.g., United States v. Candella, 487 F. 2d 1223, 1227 (2d Cir.) cert. denied, 417 U.S. 977 (1974).

But where, as here, a defendant is charged with causing the submission of false Medicaid claims and statements to the Department of Health, Education and Welfare, a Section 1001 violation is necessarily included within a violation of Section 287. First, the false claims must necessarily be or include false statements; and second, since the false claims are alleged to have been submitted to the appropriate federal department or agency (H.E.W.), the false statements necessarily include a matter within the jurisdiction of the same department or agency. Under these circumstances, both consecutive or multiple concurrent sentences are precluded just as they are where the fraud of tax evasion for a given year is committed by the filing of a false tax return and both crimes are charged in separate counts of an indictment and a conviction is obtained for both. See, e.g., United States v. Beasley, 519 F. 2d 233, 249 (5th Cir. 1975); United States v. Slutsky, 487 F. 2d 832,

845 (2d Cir.) cert. denied 416 U.S. 937 (1974); United States v. Lodwick, 410 F. 2d 1202, 1205-1206 (8th Cir. 1969).

In United States v. Slutsky, supra, the Second Circuit reaffirmed the prohibition of separate punishments for tax evasion under 26 U.S.C. §7201 and filing a false return under 26 U.S.C. §7206(1):

"In each instance, where an indictment charges both tax evasion under Section 7201 and perjury under Section 7206(1), and the evidence at trial proves the latter as an incident of the former, 'the specific form of fraudulent conduct [perjury] merges into the inclusive fraud charged under §7201.' United States v. White, supra, 417 F. 2d at 94."

487 F. 2d at 845.

In United States v. White, 417 F. 2d 89 (2d Cir. 1969), the Second Circuit clearly articulated the rationale for this result:

"[T]he perjured [tax] returns were incidental steps in the consummation of the completed offense of attempted defeat or evasion of tax . . . and as such each constituted a crime within a crime under the lesser included offense doctrine."
(citations omitted)

417 F. 2d at 93.* The fact that Sections 7201 and 7206(1)

*Failure to file a tax return in violation of 26 U.S.C. §7203 is similarly a lesser included offense of tax evasion. United States v. Terrell, 390 F. Supp. 371, 378 (S.D.N.Y. 1975) (Weinfeld, J.).

contain different legal elements did not preclude the latter from being held a lesser included offense under the circumstances presented.

Precisely the same rationale applies to causing the filing of false claims in violation of 18 U.S.C. §287 which themselves are or contain false statements in violation of 18 U.S.C. §1001. The false statements (caused by the perjurious certification of Medicaid invoices) are incidental steps in the consummation of the overall fraud of submitting false claims and upon conviction merge into the inclusive fraud of the false claims.

Furthermore, the additional reason for the prohibition of separate sentences in Slutsky and White, that the violated statutes were part of the same regulatory scheme "to prohibit and punish fraud occurring in the assessment and collection of taxes by the government," United States v. White, supra, 417 F. 2d at 93, applies to the present case where both statutes are part of a regulatory scheme dealing with other types of fraud against the government. Indeed, as previously stated, both statutes in the present case are derived from the same prior statute and there is nothing in the legislative history of 18 U.S.C. §§287 and 1001 which would suggest that they be interpreted differently on the sentencing issue before this

Court from the way in which the Court has construed analogous sections of the Internal Revenue Code in Slutsky and White.

None of the cases relied on by the government in the District Court supports the imposition of consecutive sentences in the present case (A 25, A 26). Both Swepton v. United States, 289 F. 2d 166 (8th Cir. 1961) and United States v. Wertheimer, 434 F. 2d 1004 (2d Cir. 1970) simply upheld the permissibility of consecutive sentences for separate violations of 18 U.S.C. §287 which were contained in separate counts of the same indictment. Neither case dealt with consecutive sentences for violations of 18 U.S.C. §§287 and any other statute.

Harris v. United States, 359 U.S. 19 (1959), the principal case relied on by the government, upheld consecutive sentences under separate statutes regulating possession of heroin. The Court quoting in part from its own language in Gore v. United States, 357 U.S. 386 (1958), emphasized, however, that the indictment in Gore involved:

"three violations of three separate offenses created by Congress at three separate times. [This] indicated a clear and continuing purpose on its part of dealing more and more strictly with, and seeking to throttle more and more by different legal devices, the traffic in narcotics." (Emphasis supplied.)

359 U.S. at 22. Harris involved two of the same three statutes.

Harris is thus inapposite in the present case where the two statutes under which the defendant was sentenced were created at the same time by the amendment of a single prior statute with no discernible Congressional purpose to multiply punishments for false claims necessarily containing false statements.

Moreover, the decision in Harris v. United States, supra, came before the decision in Sansone v. United States, 380 U.S. 343 (1965). Sansone, ruling as it did that the filing of a false income tax return could be a lesser included offense of tax evasion, formed the basis for the Second Circuit's holding in United States v. White, supra, 417 F. 2d at 94. Thus, the cases supporting the general permissibility of consecutive sentencing relied on by the government simply fail to take account of the exception created by Slutsky and White and the government has failed to suggest any principled basis for distinguishing them.

In sum, the two statutes contained in the Information are part of the same regulatory scheme, and on the facts of this case, the crime described by Count 2 is but a lesser included offense of the crime described in Count 1. Consequently, separate sentences are prohibited.*

*The fact that the aggregate prison sentences imposed on Counts 1 and 2 do not exceed the maximum penalty permitted under Count 1 has no bearing on the result required on this appeal. The sentence on Count 2 must be wholly vacated and the defendant may not be resentenced to any increased penalty on Count 1. United States v. Sacco, 367 F. 2d 368, 369-370 (2d Cir. 1966). Accord, United States v. Turner, 518 F. 2d 14 (7th Cir. 1975); Chandler v. United States, 468 F. 2d 834, 836-837 (5th Cir.

CONCLUSION

The sentence on Count 2 must be vacated.

DATED: New York, New York
December 10, 1976

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OF COUNSEL
Stanley S. Arkin
S. Andrew Schaffer

(ftn. contd.)

1972); United States v. Welty, 426 F. 2d 615, 617 (3d Cir.
1970).

JOINT APPENDIX

TABLE OF CONTENTS

	PAGE
Docket Sheet	A 1
Judgment And Probation Commitment Order	A 3
Indictment	A 5
Superseding Information.	A 15
Motion To Reduce Sentence.	A 19
Memorandum Of Law In Opposition To Reduction Of Sentence	A 24
Affidavit In Response To Memorandum In Opposition To Reduction Of Sentence	A 28

OFFENSE PO JUDGE ~~XXXXXX~~ Assigned U.S.
OFFENSE NO. 0857
MATERIAL NO. 1
FELONY Fel X 0208 1
Disp/Sentence

A 1
DOCKET SHEET
VS
ASHER, JOHN ERROL

Case Filed
06 03
76 0518 01
No. of Docket
* 01

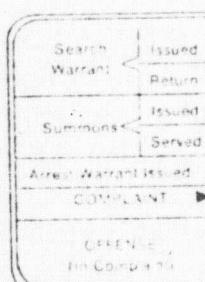
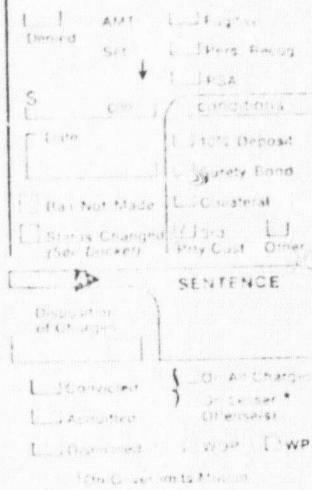
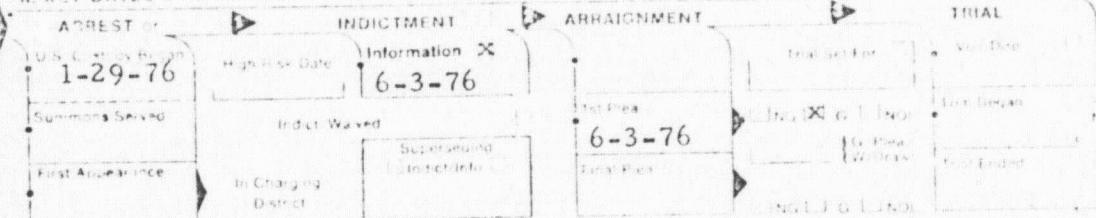
U.S. MAIL CASE NO. 2

U.S. ATTORNEY SECTION
18:287
18:1001

OFFENSES CHARGED
False claims against the U.S. 1
False statements submitted to U.S. Agency. 2

ORIGINAL COUNTS

II. KEY DATES & INTERVALS



DATE	INITIAL NO.	MAGISTRATE	OUTCOME
		INITIAL APPEARANCE DATE Preliminary Examination or Removal Hearing Waived INTERVENING INDICTMENT	DISMISSED HELD FOR TRIAL ON OTHER PROSECUTION IN THIS DISTRICT HELD FOR TRIAL ON OTHER PROSECUTION IN THIS DISTRICT

U.S. Attorney or Asst.

George E. Wilson
791-1952

S. Andrew Schagger, Esq.
300 Madison Ave.
New York, NY

Draw law names and serial numbers of other defendants on same indictment information.

DATE	DOCUMENT NO.	PROCEEDINGS	EXCLUDABLE DELAY
6-3-76		Filed information and waiver of indictment. Referred to Judge Carter as a related case 76 Cr 242. Deft. (Atty. present) pleads guilty to counts 1 and 2. Pre-sentence report ordered. Sentence adjourned to July 20, 1976 at 9:30 A.M. in Ct. Rm. 318 Deft. continued R.O.R. Case assigned to Judge Carter. Filed Govt's Sentencing memorandum.	Carter, J.
7-20-76		Filed Judgment and Probation/Commitment Order= The Deft is hereby committed to the custody of the Atty General for imprisonment for a period of TWO (2) YEARS on COUNT #1, and on the condition that the Deft. be confined in a jail type institution for a period of SIX (6) MONTHS, the execution of the remainder of sentence of imprisonment is hereby suspended, and the Deft. is placed on Probation for a period of EIGHTEEN (18) MONTHS, subject to the standing probation order of this Court. TWO (2) YEARS on COUNT 2, and on the condition that the Deft. be confined in a jail type institution for a period of SIX (6) MONTHS, the execution of the remainder of the sentence of imprisonment is hereby suspended. Sentence on COUNT #2 is to run CONSECUTIVELY with sentence imposed on COUNT #1. Pursuant to Title 18, United States Code, Section 3651. The Deft is ordered to surrender on August 20, 1976 at 10:30 A.M. in Part I Courtroom #506. The Deft. is placed on Probation for a period of ONE (1) DAY on COUNT #2. Probation is to	
7-20-76			

A 2
DOCKET SHEET

NOTE: THE APPLICABLE DOCKET ENTRIES SHOWN IN SECTION V. ANY OCCURRENCE OF EXCLUDABLE DELAY FEL TO USC § 316

DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY		
			TYPE	DESCRIPTION	END DATE
	DOCUMENT NO.:				
8-4-76	commence upon the Deft's release from prison after service of imprisonment imposed.....CARTER, J.				
8-9-76	Filed Deft's affdvt & Notice of Motion for reduction of sentence imposed on July 20, 1976.				
	Filed Consent Order that the Deft surrender himself to the Warden of such U.S. Correctional Institution as may be designated by the U.S. Bureau of Prisons on August 20, 1976 at 9:00 A.M. or at such later date as directed by the U.S. Marshals for the SDNY or the Federal Bureau of Prisons to commence service of the sentence of imprisonment imposed by this Court on July 20, 1976.GOETTEL, J.				
8-31-76	Placing of case on calendar 6-3-76				
9-15-76	Fld Govt's affid in opposition to deft's motion to reduce sentence				
9-15-76	Fld memo end on motion fld 8-4-76 - Motion denied so ordered Carter, J. M/N				
9-23-76	Fld Deft's Motion for vacation of sentence pur to FRCrP #35...ret 10-1-76-10Am				
9-23-76	Fld Deft's memo in support of its motion to vacate.				
10-14-76	Filed Govt's Memorandum of Law in opposition to Defts motion for a reduction of sentence.				
10-20-76	Fld deft's addvt in further support of deft's motion to vacate sentence.				
10-20-76	Fld Deft's memo in support of its motion to vacate ^{reply}				
LL-L8-76	Filed MEMO-ENDORSED <u>on</u> deft's motion to vacate sentence filed 9-23-76. Motion denied. Carter, J. M/N.				

A TRUE COPY
RAYMOND F. BURCHARDT, Clerk

By J. W. KERKMEYER
Deputy Clerk

[Signature]

A 3
JUDGMENT AND PROBATION
COMMITMENT ORDER

United States of America vs.

DEFENDANT

JOHN ERROL ASHER

United States District Court for

SOUTHERN DISTRICT OF NEW YORK

DOCKET NO. 3:76 Cr. 513 R.L.G.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
7 20 76

COUNSEL

WITHOUT COUNSEL However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

WITH COUNSEL

S. ANDREW SCHAFER ESQ.

(Name of counsel)

PLEA

GUILTY, and the court being satisfied that
there is a factual basis for the plea, to
counts 1 & 2.

NOLO CONTENDERE.

NOT GUILTY

NOT GUILTY. Defendant is discharged

GUILTY.

FINDING &
JUDGMENT

The defendant has been convicted as charged of the offense(s) of unlawfully, wilfully, and knowingly, did make and present, to the United States Department of Health, Education and Welfare, for payment, certain claims upon and against the United States by submitting various "Invoices for Doctor's Services" to the New York City Department of Social Services to certain Medicaid patients which were false, fictitious, and fraudulent in that some or all of the said services were not furnished by him. (Title 18, United States Code, Section 237). unlawfully, wilfully, and knowingly did falsify, conceal and cover up, and caused to be falsified, concealed and covered up, and appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO(2)YEARS

SENTENCE
OR
PROBATION
ORDER

on count 1, and on the condition that the defendant be confined in a jail type institution for a period of SIX(6)MONTHS, the execution of the remainder of the sentence of imprisonment is hereby suspended, and the defendant is placed on probation for a period of EIGHTEEN(18)MONTHS, subject to the standing probation order of this Court. TWO(2)YEARS on count 2, and on the condition that the defendant be confined in a jail type institution for a period of SIX(6)MONTHS, the execution of the remainder of the sentence of imprisonment is hereby suspended. Sentence on count 2 is to run CONSECUTIVELY with sentence imposed on count 1. Pursuant to Title 18, United States Code, Section 3611. The defendant is ordered to surrender on August 20, 1976 at 10:30 A.M. in Part I court room 506. The defendant is placed on probation for a period of ONE(1)DAY on count 2. Probation is to commence upon the defendant's release from prison after service of sentence of imprisonment imposed.

SPECIAL
CONDITIONS
OF
PROBATION

BEST COPY AVAILABLE

A 4
JUDGMENT AND PROBATION
COMMITMENT ORDER

ADDITIONAL
CONDITIONS
OF
PROBATION

COMMITMENT
RECOMMENDATION

SIGNED BY

U.S. District Judge

U.S. Magistrate



ROBERT L. CARTER

Date 12/12/60 1960

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other judicial officer.

CERTIFIED AS A TRUE COPY ON

12/12/60

BY ROBERT L. CARTER
CLERK OF COURT DEPUTY

OFFENSE CONTINUED

trick, scheme and device, material facts, to be used false writings and documents knowing the same to contain false, fictitious and fraudulent entries charged upon "Invoices for Doctor's Services" (Title 1 United States Code, Section 1931) in violation of the general conditions of probation set out in the order of the Court, may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period, if the maximum probation period of five years permitted by law, may issue a warrant and revoke the probation for any violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

A 5
INDICTMENTUNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----
UNITED STATES OF AMERICA : :

- v - : :

JOHN ERROL ASHER, : :

INDICTMENT

S 76 Cr. 242

Defendant. : :

3/11/74

COUNTS ONE THROUGH THIRTY-TWO

The Grand Jury charges:

1. On July 30, 1965, Title XIX of the Social Security Act (the "Medicaid Act") was enacted creating the Medicaid program.
2. Pursuant to the Medicaid Act, the United States Department of Health, Education and Welfare shares with each state the cost of medical services to families with dependent children and to aged, blind, or permanently and totally disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services.
3. The Medicaid program further provides for rehabilitative and other services to help such families and individuals attain or retain capability for independence and self-care.
4. Pursuant to the Medicaid Act each state must promulgate a plan for Medicaid assistance.
5. On May 1, 1966 the State of New York enacted a statewide medical plan in accordance with the provisions of the Medicaid Act.

INDICTMENT

6. The New York State Social Welfare Law vests responsibility for the medical assistance program within New York State in the State Department of Social Services.

7. The Department of Social Services of the City of New York, located at 330 West 34th Street in Manhattan, processes and pays claims by various providers for Medicaid services rendered within New York City. The nature and amount of all such claims is reported monthly by New York City to the New York State Department of Social Services.

8. The New York State Department of Social Services submits quarterly to the Department of Health, Education and Welfare a report detailing the nature and amount of such claims.

9. The Department of Health, Education and Welfare reimburses federally qualified claims at the rate of fifty cents on each dollar paid by the State of New York.

10. At all times material herein JOHN ERROL ASHER, the defendant, was licensed by the State of New York as a medical doctor who specialized in internal medicine and was certified by the City of New York as a Medicaid provider. Defendant practiced among other places at the Queensbridge Medical Group, 38-81 13th Street, Long Island City, New York and the Claremont Medical Center, 3539 3rd Avenue, Bronx, New York. The business of said clinics was to provide health-care services to Medicaid-eligible patients.

11. On or about the date set forth in paragraph 12 of this Indictment JOHN ERROL ASHER, the defendant, and others to the Grand Jury known and unknown, engaged in a scheme and artifice to defraud the City of New York, the State of New York and the United States, whereby they would obtain money by false, fictitious and fraudulent pretenses

1-1510
and representations. A / INDICTMENT
Defendant prepared and caused to be
prepared and submitted and caused to be submitted certain
invoices for payment for claimed medical services rendered
to Medicaid patients. In truth and in fact some or all of
the claimed services were not performed by the defendant and
the patients were never seen by defendant on the dates
claimed. These invoices, and others, were submitted to the
City of New York for payment and subsequently formed the
basis for claims by the State of New York against the United
States Department of Health, Education and Welfare for
reimbursement pursuant to the Medicaid Act. The proceeds of
the false and fraudulent claims were then divided among the
defendant and his accomplices.

12. On or about the dates set forth below in the
Southern District of New York, JOHN ERROL ASHER, the defen-
dant, unlawfully, wilfully and knowingly did make and present,
and cause to be made and presented to the United States
Department of Health, Education and Welfare, a department
and agency of the United States, for payment, certain claims
upon and against the United States, to wit, by submitting
and causing to be submitted, various "Invoices for Doctor's
Services" to the New York City Department of Social Services
which invoices contained his certification that the services
described therein were furnished by him at certain times to
certain Medicaid patients, when in truth and in fact, as he
then and there well knew, said claims were false, fictitious
and fraudulent in that said services were not furnished by
him.

<u>COUNT</u>	<u>DATE</u>	<u>NAME</u>	<u>INVOICE NUMBER</u>
1	February 11, 1971	Sam Fontanez Lucy Fontanez Peter Fontanez Eva Fontanez	1406729

<u>COUNT</u>	<u>DATE</u>	<u>A 8 INDICTMENT</u>	<u>NAME</u>	<u>INVOICE NUMBER</u>
2	February 11, 1971		Patay Banks Nelson Banks Frank Banks	L406733
3	February 22, 1971		Richard Santiago Barbara Santiago Dolores Santiago David Santiago	L405788
4	February 25, 1971		Richard Santiago Barbara Santiago Dolores Santiago David Santiago	L405791
5	February 25, 1971		Helen Jackson Sharon Jackson Michelle Jackson	L249742
6	March 6, 1971		Raymond Diaz Elizabeth Diaz Vilma Diaz	L514647
7	March 13, 1971		David Lewis Guy Lewis	0047764
8	March 13, 1971		Cheryl Lester Dawn Lester Deniss Lester	0047759
9	March 15, 1971		Robert Gray Eartha Gray Eric Gray	0047772
10	March 15, 1971		Gloria Suarez John Suarez Victor Suarez	0047767
11	March 15, 1971		Lucy Fontanez Eva Fontanez Peter Fontanez	0047765
12	March 15, 1971		Elsie Barreto Ann Barreto Ramon Barreto	0047773
13	March 17, 1971		David Lewis Guy Lewis	0047785
14	March 17, 1971		Denise Lester Cheryl Lester	0047795
15	March 18, 1971		Ana Barreto Elsie Barreto Ramon Barreto	0047815
16	March 18, 1971		Lucy Fontanez Eva Fontanez Peter Fontanez	0047801
17	March 18, 1971		Gloria Suarez Victor Suarez	0047816

A 9
INDICTMENTCEN:1q
M-1316

<u>COUNT</u>	<u>DATE</u>	<u>NAME</u>	<u>INVOICE NUMBER</u>
15	March 13, 1971	Robert Gray Eartha Gray	0047300
19	April 12, 1971	Eloisa Diaz Elizabeth Diaz	0359039
20	April 15, 1971	Frank Banks Patsy Banks Nelson Banks	0359078
21	April 15, 1971	Arcadio Mendoza Martina Mendoza Joseph Mendoza	0269083
22	April 17, 1971	Eloisa Diaz Vilma Diaz Elizabeth Diaz	P533270
23	April 19, 1971	Elsie Barreto Ann Barreto Patricia Barreto	P533284
24	April 20, 1971	Eva Fontanez Peter Fontanez Angelo Fontanez	P533293
25	April 22, 1971	Eloisa Diaz Vilma Diaz Elizabeth Diaz	P533336
26	May 12, 1971	Lisa Diaz Elizabeth Diaz Raymond Diaz	0700444
27	May 12, 1971	Arcadio Mendoza Frank Mendoza	0045894
28	May 24, 1971	Vivian Jones Linda Jones	P358320
29	May 24, 1971	Michelle Jackson Sharon Jackson	P358406
30	May 27, 1971	Michelle Jackson Sharon Jackson	P358546
31	May 27, 1971	Sharon Jackson Michelle Jackson	P358552
32	May 27, 1971	Linda Jones Vivian Jones	P358547

(Title 13, United States Code, Sections 237 and 2.)

A 10
INDICTMENT

GEW:lq
M-1316

COUNTS THIRTY-THREE THROUGH SIXTY-FOUR

The Grand Jury further charges:

13. From on or about the date set forth below in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit: the United States Department of Health, Education and Welfare, JOHN ERROL ASHER, the defendant, unlawfully, wilfully and knowingly did falsify, conceal and cover up, and cause to be falsified, concealed and covered up, by trick, scheme and device, material facts, and did make and cause to be made false, fictitious and fraudulent statements and representations and did make and cause to be made and did use and cause to be used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries, in that the defendant, JOHN ERROL ASHER, submitted and caused to be submitted to the United States Department of Health, Education and Welfare various false and fraudulent statements which were based in part upon "Invoices for Doctor's Services" in which defendant certified and caused to be certified that medical services were furnished by him to the medicaid patients listed therein, when, in truth and in fact, as the defendant then and there well knew, said certifications were false in that the claimed medical services were not rendered.

<u>COUNT</u>	<u>DATE</u>	<u>NAME</u>	<u>INVOICE NUMBER</u>
33	February 11, 1971	Sri Fontanez Lucy Fontanez Peter Fontanez Eva Fontanez	L406729

<u>COUNT</u>	<u>DATE</u>	<u>NAME</u>	<u>INVOICE NUMBER</u>
34	February 11, 1971	Patsy Banks Nelson Banks Frank Banks	L406733
35	February 22, 1971	Richard Santiago Barbara Santiago Dolores Santiago David Santiago	L406733
36	February 25, 1971	Richard Santiago Barbara Santiago Dolores Santiago David Santiago	L406701
37	February 25, 1971	Helen Jackson Sharon Jackson Michelle Jackson	L249742
38	March 6, 1971	Raymond Diaz Elizabeth Diaz Vilma Diaz	L514647
39	March 13, 1971	David Lewis Guy Lewis	0047764
40	March 13, 1971	Cheryl Lester Dawn Lester Denise Lester	0047759
41	March 15, 1971	Robert Gray Eartha Gray Eric Gray	0047772
42	March 15, 1971	Gloria Suarez John Suarez Victor Suarez	0047767
43	March 15, 1971	Lucy Fontanez Eva Fontanez Peter Fontanez	0047765
44	March 15, 1971	Elsie Barreto Ann Barreto Ramon Barreto	0047773
45	March 17, 1971	David Lewis Guy Lewis	0047735
46	March 17, 1971	Denise Lester Cheryl Lester	0047795
47	March 18, 1971	Ann Barreto Elsie Barreto Ramon Barreto	0047815
48	March 18, 1971	Lucy Fontanez Eva Fontanez Peter Fontanez	0047801
49	March 18, 1971	Gloria Suarez Victor Suarez	0047816

A 12
INDICTMENT

GEW:1q
M-1316

<u>COUNT</u>	<u>DATE</u>	<u>NAME</u>	<u>INVOICE NUMBER</u>
50	March 18, 1971	Robert Gray Eartha Gray	0047300
51	April 12, 1971	Eloisa Diaz Elizabeth Diaz	0369039
52	April 15, 1971	Frank Banks Patsy Banks Nelson Banks	0369073
53	April 15, 1971	Arcadio Mendoza Martina Mendoza Joseph Mendoza	0369083
54	April 17, 1971	Eloisa Diaz Vilma Diaz Elizabeth Diaz	P533270
55	April 19, 1971	Elsie Barreto Ann Barreto Patricia Barreto	P533284
56	April 20, 1971	Eva Fontanez Peter Fontanez Angelo Fontanez	P533293
57	April 22, 1971	Eloisa Diaz Vilma Diaz Elizabeth Diaz	P533336
58	May 12, 1971	Lisa Diaz Elizabeth Diaz Raymond Diaz	0700444
59	May 12, 1971	Arcadio Mendoza Frank Mendoza	0046394
60	May 24, 1971	Vivian Jones Linda Jones	P358320
61	May 24, 1971	Michelle Jackson Sharon Jackson	P358406
62	May 27, 1971	Michelle Jackson Sharon Jackson	P358546
63	May 27, 1971	Sharon Jackson Michelle Jackson	P358552
64	May 27, 1971	Linda Jones Vivian Jones	P358547

(Title 18, United States Code, Sections 237 and 2.)

A 13
INDICTMENT

COUNT SIXTY-FIVE

The Grand Jury further charges:

14. On or about the 14th day of April, 1972 in the Southern District of New York and elsewhere, JOHN ERROL ASHER, the defendant, unlawfully, wilfully and knowingly did attempt to evada and defeat a large part of the income tax due and owing by himself to the United States of America for the calendar year 1971, by preparing and causing to be prepared, signing and causing to be signed, filing and causing to be filed with the Internal Revenue Service, a false and fraudulent individual income tax return on behalf of himself, wherein it was stated that his taxable income for the said calendar year was \$5,337.00 and that the income tax due and owing them was \$951.84, whereas the defendant then and there well knew that his taxable income for the said calendar year was approximately \$24,367.65 upon which said taxable income then was due and owing to the United States of America an income tax of approximately \$5,792.35.

(Title 26, United States Code, Section 7201.)

COUNT SIXTY-SIX

The Grand Jury further charges:

15. On or about April 14, 1972, in the Southern District of New York and elsewhere JOHN ERROL ASHER, the defendant, unlawfully, wilfully and knowingly did make and subscribe a 1971 United States Individual Income Tax Return, which was verified by a written declaration that it was made under the penalties of perjury and was filed with an office of the District Director of Internal Revenue Service which Individual Income Tax Return he did not believe to be true and correct as to every material matter in that the said

A 14
INDICTMENT

GEW:1q
M-1316

Individual Income Tax return stated that defendant JOHN ERROL ASHER's gross receipts for the calendar year 1971 were \$17,100.00 whereas defendant JOHN ERROL ASHER then and there well knew and believed that he has additional gross receipts totalling approximately \$23,913.22 which were not reported for the said calendar year.

(Title 26, United States Code, Section 7206(1).)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

A 15
SUPERSIDING INFORMATION

CEW:bmj
M-1316

RECEIVED

APR 22 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - -

UNITED STATES OF AMERICA : STANLEY S. ARKIN, P.C.
- v - : INFORMATION
JOHN MAROL ASHER, : S 76 Cr.
Defendant. :
- - - - -

COURT OWN

The United States Attorney charges:

1. On July 30, 1965, Title XIX of the Social Security Act (the "Medicaid Act") was enacted creating the Medicaid program.

2. Pursuant to the Medicaid Act, the United States Department of Health, Education and Welfare shares with each state the cost of medical services to families with dependent children and to aged, blind, or permanently and totally disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services.

3. The Medicaid program further provides for rehabilitative and other services to help such families and individuals attain or retain capability for independence and self-care.

4. Pursuant to the Medicaid Act each state must promulgate a plan for Medicaid assistance.

5. On May 1, 1966 the State of New York enacted a statewide medical plan in accordance with the provisions of the Medicaid Act.

6. The New York State Social Welfare Law vests responsibility for the medical assistance program within New York State in the State Department of Social Services.

7. The Department of Social Services of the City of New York, located at 330 West 24th Street in Manhattan, processes and pays claims by various providers for Medicaid services rendered within New York City. The nature and amount of all such claims is reported monthly by New York City to the New York State Department of Social Services.

8. The New York State Department of Social Services submits quarterly to the Department of Health, Education and Welfare a report detailing the nature and amount of such claims.

9. The Department of Health, Education and Welfare reimburses federally qualified claims at the rate of fifty cents on each dollar paid by the State of New York.

10. At all times material herein JOHN ERROL ASHER, the defendant, was licensed by the State of New York as a medical doctor who specialized in Internal medicine and was certified by the City of New York as a medicaid provider. Defendant practiced among other places at the Queensbridge Medical Group, 38-81 13th Street, Long Island City, New York, the Claremont Medical Center, 3589 3rd Avenue, Bronx, New York and at 57 Avenue D, New York, New York. The business of said clinics was to provide health-care services to Medicaid-eligible patients.

11. On or about the dates set forth in paragraph 12 of this Information JOHN ERROL ASHER, the defendant, engaged in a scheme and artifice to defraud the City of New York, the State of New York and the United States, whereby he would obtain money by false, fictitious and fraudulent pretenses and representations. Defendant prepared and

caused to be prepared and submitted and caused to be submitted certain invoices for payment for claimed medical services rendered to Medicaid patients. In truth and in fact some or all of the claimed services were not performed by the defendant and the patients were never seen by defendant on the dates claimed. These invoices, and others, were submitted to the City of New York for payment and subsequently formed the basis for claims by the State of New York against the United States Department of Health, Education and Welfare for reimbursement pursuant to the Medicaid Act. Part of the proceeds of the false and fraudulent claims were received by the defendant.

12. From on or about November 1, 1970 to on or about December 31, 1973 in the Southern District of New York, and elsewhere, JOHN ERROL ASHER, the defendant, unlawfully, wilfully and knowingly did make and present, and cause to be made and presented to the United States Department of Health, Education and Welfare, a department and agency of the United States, for payment, certain claims upon and against the United States, to wit, by submitting and causing to be submitted, various "Invoices for Doctor's Services" to the New York City Department of Social Services which invoices contained his certification that the services described therein were furnished by him at certain times to certain Medicaid patients, when in truth and in fact, as he then and there well knew, said claims were false, fictitious and fraudulent in that some or all of the said services were not furnished by him.

A 18
SUPERSEDING INFORMATION
COUNT TWO

The United States Attorney further charges:

13. From on or about November 1, 1970, to on or about December 31, 1973, in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit, the United States Department of Health, Education and Welfare, JOHN ERROL ASHER, the defendant, unlawfully, wilfully and knowingly did falsify, conceal and cover up, and cause to be falsified, concealed and covered up, by trick, scheme and device, material facts, and did make and cause to be made false, fictitious and fraudulent statements and representations and did make and cause to be made and did use and cause to be used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries, in that the defendant, JOHN ERROL ASHER submitted and caused to be submitted to the United States Department of Health, Education and Welfare various false and fraudulent statements which were based upon "Invoices for Doctor's Services" in which it was certified that medical services were furnished by him to the medicaid patients listed therein, when, in truth and in fact, as the defendant then and there well knew, said certifications were false in that some or all of the claimed medical services were not rendered.

(Title 18, United States Code, Section 1001).

ROBERT E. FISKE, JR.
United States Attorney

A 19
MOTION TO REDUCE SENTENCE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :
:

-against- /

NOTICE OF MOTION

JOHN E. ASHER, :
:

S 76 Cr. 518 (RLC)

Defendant. :
-----X

S I R :

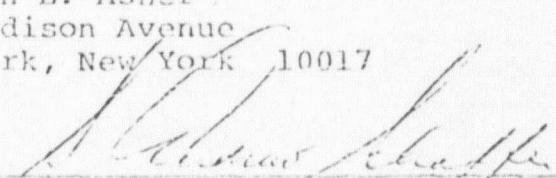
PLEASE TAKE NOTICE that upon the affidavit of S. Andrew Schaffer, Esq., sworn to on August 3, 1976, and all prior proceedings, the defendant John E. Asher will move this Court, before the Honorable Robert L. Carter at 10:00 on Friday, August 16, 1976 or such other time and place to be fixed by the Court for a reduction of the sentence imposed on July 20, 1976, and such other and further relief as to the Court seems just and proper.

DATED: New York, New York
August 3, 1976

Yours, etc.,

STANLEY S. ARKIN, p.c.
Attorneys for Defendant
John E. Asher
300 Madison Avenue
New York, New York 10017

BY:


S. Andrew Schaffer

TO: HONORABLE ROBERT B. FISKE, JR.
United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

A 20
MOTION TO REDUCE SENTENCE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :
:

-against- :
:

AFFIDAVIT

JOHN E. ASHER, :
:

S 75 Cr. 518 (RLC)

Defendant. :
-----X

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

S. ANDREW SCHAFER, being duly sworn, says:

I am an attorney at law and counsel to the firm of STANLEY S. ARKIN, p.c., which represents the defendant John E. Asher. This affidavit is submitted in support of the defendant's motion, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, to reduce his sentence.

A. Reduction of Sentence

The defendant respectfully asks the Court to reduce his sentence.

At the time of sentencing on July 20, 1976, the Court stated that it "certainly [did not] want to destroy" Dr. Asher. Regretfully, the sentence and its attendant publicity as the harshest sentence yet handed out in any case involving Medicaid fraud, have already had an extraordinarily devastating effect on Dr. Asher, his wife, and their future.

Despite the prior knowledge of authorities at Montefiore Hospital of Dr. Asher's plea of guilty, the defendant was fired from his job. He was similarly fired from a part-time job in New Jersey where he had been hoping to acquire funds prior to any surrender date to maintain child support payments and begin to repay

A 21
MOTION TO REDUCE SENTENCE

his agreed on civil penalties. Worst of all, Dr. Asher has been forged into a symbol of many evils of the Medicaid system which he simply does not embody. It is true, and he has admitted obtaining some \$10,000 of federal funds through fraudulent billing. But he has never remotely performed any act of medical negligence or malpractice, nor in any way failed to adhere to the highest standards of medical excellence in diagnosis and treatment. The letters submitted to the Court prior to sentencing from his professional colleagues certainly support his outstanding professional abilities and standards.

Even more important, however, are Dr. Asher's compassion for human life and his respect for human dignity. As the young doctors he has trained this past year stated in their letter to the Court of April 21, 1976:

"Morrisania is a hospital that serves in large measure . . . [societal outcasts such as] the derelicts and the drug addicts. Dr. Asher has repeatedly insisted that medicine knows no class distinctions, and that all patients, regardless of their background, must be treated with dignity and respect. We are grateful for the privilege of working with Dr. Asher and benefited from his knowledge and his humanity."

Similarly, the letters from his patients make clear that John Asher is anything but the heartless, indifferent, incompetent quack found in all too many "medicaid mills."

But the sentence imposed by the Court has obscured these significant facts. Dr. Asher has effectively been sentenced to the longest prison term of anyone so far convicted and sentenced as a result of a two year Medicaid fraud investigation by the United States Attorney's Office. Of the 19 similarly situated defendants sentenced in this Courthouse by eight different judges, one case involved a 12-month sentence and one a 6-month sentence. Of the remaining 13 cases involving a prison sentence, all involved sen-

A 22
MOTION TO REDUCE SENTENCE

tences of three months or less. Four cases involved no incarceration at all:

Notwithstanding the fact of Dr. Asher's contrition and corresponding plea of guilty, he has now become known, and unfairly so, as the chief villain in a tragedy in which his role was much less significant than numerous others who designed, ran, and even made an entire career of living off a system which undermined services to the helpless and disadvantaged and who never made any semblance of a contribution to the welfare of patients.

The impact of Dr. Asher's sentence on his personal life and future threatens to be far greater than the Court may have had in mind. If his sentence stands as pronounced, Dr. Asher will go before medical licensing boards, not as a man who was convicted of financial frauds dating back some four or five years, but as the personification of medicine's failure to give care to the poor. Years of intense devotion and service to the underprivileged by Dr. Asher, which bespeak the falseness of that label, are now submerged, and in the eyes of his future judges he will have to fight for his professional life as the man whom the judicial system found the most culpable of hurting the poor.

For these reasons, the defendant sincerely begs the Court to reconsider and reduce its sentence.

B. Title 18, United States Code, Section 4205(f)

Should the Court either decline to reduce the duration of the defendant's prison terms or should the Court reduce them to a period which still requires service of six months or more, the defendant respectfully requests that the Court declare him eligible for release as if on parole after serving one-third of his sentence pursuant to the newly enacted provisions of 18 U.S.C. §4205(f).

(Added Pub. L. 94-233, March 15, 1976, 90 Stat. 222).

A 23
MOTION TO REDUCE SENTENCE

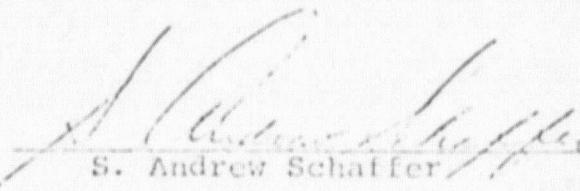
Section 4205(f) provides:

(f) Any prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year shall be released at the expiration of such sentence less good time deductions provided by law, unless the court which imposed sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms notwithstanding the provisions of section 4164. This subsection shall not prevent delivery of any person released on parole to the authorities of any State otherwise entitled to his custody.

Under prior law, a person serving sentences aggregating over 180 days was automatically eligible for parole after serving one-third of his sentence. See former Section 4202 of Title 18, United States Code; Brown v. United States, 256 F. 2d 151 (5th Cir. 1958). Under the amended law, the Court may "at the time of sentencing" authorize release as if on parole of persons serving terms of six months up to one year. The phrase, "at the time of sentencing," also includes the 120-day time period for sentence modification pursuant to Rule 25, F.R.C.P. (See Joint Explanatory Statement of the Committee of Conference, U.S. Code Cong. and Adm. News, April 26, 1976, p. 589.)

C. Oral Argument

Finally, the defendant would ask the Court to grant a hearing on this motion.


S. Andrew Schaffer

Sworn to before me this

day of August, 1976.

JNR:ma

A 24
MEMORANDUM OF LAW IN OPPOSITION
TO REDUCTION OF SENTENCE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA, :
-against- : S 76 Cr. 518 (RLC)
JOHN E. ASHER, :
Defendant. :
----- x

MEMORANDUM OF LAW

The Government submits this memorandum in opposition to the motion of the defendant, John Asher, for a reduction of his sentence.

Argument

Asher asserts, in his moving papers, that his consecutive jail terms were illegally imposed by the Court. This claim is meritless.

In the first instance, Asher incorrectly asserts that the factual basis for his plea on each count was the same. This is not true. Although the false statement count was based upon the invoices submitted by Asher, the false claims which were actually made upon the Federal Government occurred months after Asher's invoices were submitted, when New York State's claim for reimbursement was

JNR:ma

A 25
MEMORANDUM OF LAW IN OPPOSITION
TO REDUCTION OF SENTENCE

made upon the Federal Government. It was that false claim which Asher caused to be made by his submission of false invoices. Moreover, not every false invoice submitted by Asher resulted in a false claim upon the Government - many of the invoices were paid entirely from state and local medicaid funds.

Thus, each count in the information describes the commission of separate crimes upon which consecutive sentences were properly imposed even though Asher may have had but one overall scheme to defraud the Government.

The right to impose consecutive sentences for separate counts of the same indictment is inherent. There is no need for a statute specifically authorizing this court to impose consecutive sentences. See Harris v. United States, 359 U.S. 19 (1959); Swepston v. United States, 289 F.2d 166 (8th Cir. 1961); United States v. Wertheimer, 434 F.2d 1004 (2d Cir. 1970).

The test of whether separate offenses were actually committed in the same transaction is to determine if the elements of each are different and if the proof required for conviction is different. Blockburger v. United States, 284 U.S. 299 (1932). United States v. Bernstein, Docket Nos. 74-2328-29, 74-2462-64 (U.S.C.A. 2nd Cir.)(1976).

JNR:ma

A 26
MEMORANDUM OF LAW IN OPPOSITION
TO REDUCTION OF SENTENCE

The elements of the two counts do differ in that the offense described in section 287 (Count I) requires that a claim (for money or property) be presented to a department or agency of the United States, while the offense described in section 1001 (Count II) requires only a statement or representation (that need not involve money or property) within the jurisdiction of any department or agency of the United States.

Congressional intent with regard to those offenses is to treat them as separate and distinct. In 1948, section 30 of Title 18, United States Code, which referred to both claims and statements, was divided into two parts, present sections 287 and 1001. United States v. Johnson, 284 F. Supp. 273 (1968).

This division indicates a clear and continuing congressional purpose to deal strictly with the violation of each ^{the} fact of law.

Finally, Asker's claim that he cannot be sentenced to consecutive jail terms for two crimes resulting from the same conduct, does not withstand analysis, Harris v. United States, 359 US 19 (1959); Gore v. U.S., 357 US 386 (1958); United States v. Dioguardi, 492 F.2d 70 (2d Cir.), cert. den., 419 US 873 (1974). The cases make clear that the same conduct

JNR:ma

A 27
MEMORANDUM OF LAW IN OPPOSITION
TO REDUCTION OF SENTENCE

can be punished as two separate crimes, and consecutive
sentences imposed.

CONCLUSION

For the foregoing reasons, the defendant's
motion should be denied.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

JOEL W. ROSENTHAL,
Assistant United States Attorney
Of Counsel.

A 28
AFFIDAVIT IN RESPONSE TO MEMORANDUM
IN OPPOSITION TO REDUCTION OF SENTENCE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :
-against- :
JOHN E. ASHER, :
Defendant. :
-----X

AFFIDAVIT

S 76 Cr. 518 (RIC)

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

S. ANDREW SCHAFER, being duly sworn, deposes and says:

1. I am an attorney at law and counsel to the firm of STANLEY S. ARKIN, p.c., which represents the defendant John E. Asher. This affidavit and the accompanying memorandum of law are submitted in response to the government's memorandum of law filed in opposition to the defendant's motion to vacate the sentence imposed on Count 2 of Information S 76 Cr. 518 on July 20, 1976. It is also respectfully requested that the Court grant oral argument on the defendant's motion.

2. In order to defeat the defendant's contention that the sentence on Count 2 is an illegal multiple punishment for behavior necessarily included within and punished by the sentence on Count 1, the government has tried to go outside the factual record of this case and seeks to claim that the false invoices described by Count 2 are somehow different from those described in Count 1. This contention is utterly unsupported by the language of the Information. Moreover, it contradicted both the government's own prior pleadings in the case and by the agreement between the government and the defendant which led to the plea of

AFFIDAVIT IN RESPONSE TO MEMORANDUM
IN OPPOSITION TO REDUCTION OF SENTENCE

guilty. Indictment S 76 Cr. 242 which preceded Information S 76 Cr. 518 contained 32 counts alleging violations of 18 U.S.C. §287 (counts 1-32) and 32 counts alleging violations of 18 U.S.C. §1031 (counts 33-64). The second 32 counts itemized, seriatim and in detail, precisely the same 32 false invoices as the first 32 counts. When the superseding Information was drafted, the government and the present affiant preserved the identical parallel structure of the pleading. Specific invoice numbers were omitted and all of the defendant's possible false invoices for the period of November 1, 1970 through December 31, 1973 were made the subject of each of the two counts of the Information to which the defendant pleaded guilty. At no time was any distinction made among the invoices which were the subject of the two separate counts and no such distinction is incorporated into the language of the Information, nor was it contained in the allocation of the defendant during his plea of guilty.

WHEREFORE, the defendant respectfully requests that his motion be granted.

S. Andrew Schaffer

Sworn to before me this
18th day of October, 1976.

TO: HONORABLE ROBERT B. FISKE, JR.
United States Attorney
United States Attorney's Office
One St. Andrew's Plaza
New York, New York 10007

pretenses and representations. Plaintiff prepared and

